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IN THE

Supreme Court of the United States

SCHOOL DISTRICT OF THE CITY OF PONTIAC, *et al.*,
Petitioners,

v.

ARNE DUNCAN, SECRETARY OF EDUCATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Section 9527(a) of the No Child Left Behind Act, 20 U.S.C. § 7907(a) ("Section 7907(a)"), provides that the Federal government shall not "mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act." Yet, in the proceedings below and in its brief in opposition ("Opp."), the Respondent Secretary of Education ("Secretary") has taken the position that whether a compliance cost was or was not "*paid for* under th[e] Act" is of no consequence, as long as the cost was incurred to comply with requirements that are otherwise *authorized* by the Act.

Because the Federal Government has failed to adequately fund the programs required by the

NCLB—with the amounts appropriated having fallen short of the levels Congress authorized when it enacted the statute by tens of billions of dollars, *see* Petition at 7-8—the consequence of the Secretary's position has been to require States and school districts to divert scarce resources to pay for compliance costs that the Federal Government has "not paid for under th[e] Act," at the expense of the programs to which those State and local funds would otherwise be directed.

Of the thirteen members of the Sixth Circuit who reached the merits of the question presented here, seven rejected the Secretary's position. Rather than see this Court resolve the uncertainty that now prevails on a question that is central to the administration of this nation's principal federal education statute, the Secretary seeks to keep the matter unresolved by advancing a series of meritless contentions as to why some future case might provide a superior vehicle for deciding the question, and by urging, with more courage than conviction, that the Secretary's unlikely construction of Section 7907(a) is not only correct but unambiguously so.

The Secretary's submission is at war with the principle that State and local school officials have a right to "clear notice," *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 300 (2006), of the obligations Congress seeks to impose on them through Spending Clause legislation. With the splintered decision below, the question whether the NCLB provides clear notice of the enormous financial obligations the Secretary has been imposing on States and local governments has been left unsettled and unclear. This Court should resolve that question.

I. THIS CASE PRESENTS AN APPROPRIATE VEHICLE TO RESOLVE A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE WITH MAJOR FINANCIAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS

The Secretary seeks to ward off this Court's review by suggesting that the Court could more effectively resolve this question of statutory construction in some hypothetical case in which a school district had sought approval of an amendment to its NCLB compliance plan and in which a State was a party. *See* Opp. at 10-13. The Secretary does not seriously suggest that the absence of those features makes this case not justiciable; and, as thirteen of the sixteen judges of the *en banc* Court recognized, the case plainly *is* justiciable. *See* Pet. App. 90a-106a (opinion of Cole, J.); *id.* at 127a-137a (opinion of Sutton, J.). Nor, as we now show, do the points raised by the Secretary constitute cogent reasons for this Court to decline review.

A.

The Secretary does not maintain that there was any administrative process that petitioners were required to exhaust; but he argues that the question presented would have less of an "abstract quality," Opp. at 11, if the petitioner school districts had sought to be excused from particular NCLB compliance requirements by proposing amendments to their compliance plans for approval by their States and/or by asking their States to seek the Secretary's approval of amendments to their statewide plans. That point is not well taken: such a case would be a less appropriate vehicle for resolving the fundamental question presented here, as it would

turn on unrelated issues specific to the particular proposed plan amendment.

The question presented in this case is not "abstract," Opp. at 11, merely because it is fundamental; and it can be decided by this Court without having "to determine whether a particular requirement has been 'underfunded.'" Opp. at 11, quoting Pet. App. 182a. As the Secretary suggests, a question of the *latter* kind might "benefit[ ] from some development at the administrative level," *id.*—indeed, it might appropriately be remitted to the Secretary in the first instance; but there will be no point in pursuing an administrative inquiry into "whether a particular requirement has been 'underfunded'" unless and until this Court has disabused the Secretary of his view that the inquiry is meaningless because the Act does not prohibit unfunded mandates.

Thus, "[w]hile further administrative proceedings might sharpen the nature of some of the school districts' claims, they would not alter or make more concrete the nature of the legal question." Pet. App. 129a (opinion of Sutton, J.).

B.

The Secretary claims that an "added benefit" of waiting for a case in which a school district has resorted to the plan amendment process would be to "provid[e] the school district's State with an opportunity to consider the district's proposal and address factual issues in the first instance." Opp. at 11-12. But the question this Court is called upon to resolve does not turn on "factual issues." And, given the unanimous view of the *en banc* Court—not questioned in the Secretary's Opposition—that the petitioner school districts have standing, *see* Pet.

App. 91a–95a (opinion of Cole, J.), *id.* at 127a (opinion of Sutton, J.), there is no reason why this Court needs to have before it the views of the States of Michigan, Texas and Vermont before it can decide the pure question of statutory construction presented here. Furthermore, several States participated in the proceedings below as *amici* in support of petitioners, arguing against the Secretary's position, while no State spoke in favor of that position.

II. THE SECRETARY'S ARGUMENTS ON THE MERITS EVADE THE CLEAR STATEMENT RULE THAT GOVERNS SPENDING CLAUSE LEGISLATION AND FALL FAR SHORT OF ESTABLISHING THE CORRECTNESS OF A POSITION THAT WAS REJECTED BY SEVEN OF THE THIRTEEN MEMBERS OF THE *EN BANC* COURT WHO CONSIDERED THE QUESTION

A.

Although the Secretary pays lip service to the "clear notice" requirement of this Court's Spending Clause jurisprudence, he does not shoulder his burden to satisfy that requirement. The most he has to say is that, applying "the traditional tools of statutory interpretation," Opp. at 18, the terms of the statute do not point "overwhelmingly" against his position, *id.*, and "even Judge Cole recognized" that the Secretary's construction might ultimately be shown to be "correct," *id.* Indeed, the Secretary goes so far as to suggest that it is not even necessary for him to establish that the *statute* gives clear notice of the obligations he seeks to impose on States and school districts, because, "to the extent any confusion remained after the Act's passage," Opp. at 18-19, it

was eliminated by the time this suit was filed—*not* because Congress changed or clarified the statute in any way, but because the *Secretary*, who had initially "interpreted NCLB not to impose costs exceeding federal funding," Pet. App. 115a (opinion of Cole, J.), had changed course and had declared "that compliance would not be excused if federal funds proved insufficient," Opp. at 19.

This will not do. "Because [the NCLB] was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction." *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 83 (1999) (Thomas J., joined by Kennedy, J., dissenting). Those rules dictate that, "[i]f *Congress* intends to impose a condition on the grant of federal moneys, *it* must do so unambiguously," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added), with "clear notice," *Arlington*, 548 U.S. at 300.

B.

Such attempts as the Secretary makes to satisfy those requirements fall far short.

1. The Secretary protests that "Petitioners' argument rests entirely" on "[a] single clause." Opp. at 13, 15. But petitioners are hardly to be faulted for basing their argument on the provision of the Act that speaks directly to this question. By its terms, Section 7907(a) applies to the entire Act. The rule it declares—that States and school districts cannot be required to spend their own funds on compliance—is categorical, and there was no need for Congress to repeat it throughout the statute. Nor does section 7907(a) make an exception, as the Secretary would have it, Opp. at 14, for costs incurred in complying

with "the statutory conditions themselves." Whether the use of State and local funds is in fact a clearly stated "condition" of participation in the NCLB is precisely what must be decided here.

The "location" of Section 7907(a) "alongside a series of other . . . provisions that indisputably define the scope of agency authority," Opp. at 14, does not lend any support to the Secretary's position. Rather, it confirms that one of the fundamental limitations Congress imposed on "the scope of agency authority" is that the Department of Education cannot require a State or school district "to spend any funds or incur any costs not paid for under this Act."

The Secretary points to two NCLB provisions that he describes as "making [certain] obligations under the Act contingent upon specified levels of federal funding," Opp. at 16; and he asserts that from these, States and school districts should have deduced "that statutory obligations *not* defined in terms of expenditures must be complied with [even if] the expenditure of state or local funds turned out to be necessary," *id.* at 16-17 (emphasis in original). Those two provisions cannot bear the weight the Secretary places on them, and do not come close to providing clear notice that, notwithstanding Section 7907(a), States and school districts are under a general obligation to devote their own funds to NCLB requirements.[1]

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[1] The provision allowing States to "suspend the administration of, but not cease the development, of the [NCLB-required] assessments" for one year if the amounts appropriated for certain assessment grants fall below specified levels, 20 U.S.C. § 6311(b)(3)(D), simply sets priorities for the use of *federal* funds; it does not suggest that States or school districts must use their own funds for test "development" activities. And

2. The Secretary maintains that we have "fundamentally misunderst[oo]d the statutory scheme," because, under the NCLB, "there are no 'federally mandated compliance costs.'" Opp. at 15, quoting Petition at 4. That amounts to a contention that the prohibition in Section 7907(a) against "mandat[ing] a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act" has no meaning, because no "[ex]pend[itures] . . . or . . . costs" incurred by a State or school district in complying with the NCLB can ever be regarded as federally mandated. That cannot be correct.

In point of fact, under the NCLB States and school districts are subjected to many highly specific compliance obligations, including, for example, the obligation to administer seventeen different annual standardized tests that must satisfy a host of statutory criteria. *See* Petition at 6-7. To be sure, the extensive school improvement requirements that are triggered by the test scores—after those scores have been disaggregated into the NCLB-prescribed subgroups—permit States and school districts to select from a list of options. *See id.* at 7. But any option that will achieve the results required by the statute will be costly, and "it is naive to suggest states and school districts can achieve the[ ] ends [required by the statute] without adequate financial assistance from

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the provision requiring States to participate in certain assessments under the National Assessment of Educational Progress ("NAEP") "if the Secretary pays the cost of administering such assessments," *id.* § 6311(c)(2), simply clarifies that State participation in the NAEP, which previously had been subject to agreements entered into by the Secretary on a state-by-state basis, *id.*, § 9622(d)(3), now is subject to a uniform requirement of federal funding.

the federal government." *Amicus Curiae* Brief of the Governor of the Commonwealth of Pennsylvania, in *School District of the City of Pontiac v. Secretary of the U.S. Department of Education*, 6th Cir. No. 05-2708, at 14-15.

This is not to say that there will never be room to dispute whether a particular expenditure by a State or school district is properly viewed as having been mandated by the Federal Government through the NCLB. But that question is similar to, and no more daunting than, the inquiry the Secretary now makes as a matter of course under the maintenance-of-effort and supplement-not-supplant provisions that have long been a feature of federal education funding. *See generally* 20 U.S.C. §§ 6321, 7217, 7901. By requiring that federal funding be used to "supplement, rather than supplant, non-federally funded programs that would have been available in the absence of Title I funds," *Felton v. Secretary, United States Dep't of Educ.*, 739 F.2d 48, 50 (2d Cir. 1984), Congress for many years has charged the Secretary with making complex judgments as to the State and local programs "that would have been available," *id.*, in the absence of federal funds. *See generally Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656 (1985) (upholding Secretary's order requiring a state to return federal funds that had been used to supplant state expenditures).

For these reasons, the Secretary's contention that all NCLB compliance costs should be regarded as the unalloyed "spending choices" of States and school districts themselves rather than as the result of any federal mandates, Opp. at 15, hardly has such force as to make it "inconceivable that States would believe," *id.*, that Section 7907(a) means what peti-

tioners contend it means. After all, that is precisely what the *amici* States informed the court below they *did* believe the Act to mean when they decided to participate in the NCLB programs. *See* Petition at 10-11. And as those States explained, "[g]iven the breadth of the Secretary's waiver authority and overall authority over the implementation of the Act, there is simply no reason why the requirements of the Act cannot be implemented within the constraints of [Section] 7907(a)]." *Amicus Curiae* Brief of the States of Connecticut, Delaware, Illinois, Maine, New Mexico, Oklahoma, Wisconsin and the District of Columbia, in *School District of the City of Pontiac, et al. v. Secretary of U.S. Department of Education*, 6th Cir. No. 05-2708, at 9.

3. Finally, the enforcement concerns raised by the Secretary are of consequence only to the extent that the Federal Government fails to appropriate adequate funds to carry out the programs mandated by the NCLB. But the Act should not be interpreted on the assumption that it will be severely underfunded, and it is unreasonable to suggest that States and school districts had clear notice that Congress fashioned their compliance obligations under the Act with such an objective in mind.

In any event, the Secretary's submission, while exaggerating the difficulties that petitioners' view supposedly presents in the context of underfunding, fails to acknowledge the harm to States and school districts that flows from the *Secretary*'s interpretation. The Secretary does not deny that under his reading of the Act, States and school districts that participate in the NCLB programs can be required to pay anywhere from zero to one hundred percent of the costs, depending on the amount of funding

the Federal Government chooses to appropriate. But the Secretary blithely suggests that this is no problem, because a State or school district that is not satisfied with the amount of federal funding that is made available in any given year can simply cease its participation in the NCLB programs. *See* Opp. at 19 (arguing that "each year the States are informed of their annual funding allotments under NCLB programs," and can make a new decision whether to "voluntarily accept[ ] those federal funds"). That suggestion is contrary to reality, as it ignores the multi-year nature of NCLB commitments. If a State or school district starts the process of developing the seventeen separate standardized tests required by the Act, or of implementing the Act's comprehensive school improvement requirements, only to be confronted in subsequent years with grossly inadequate levels of federal funding, giving the State or school district the theoretical right to walk away hardly solves the problem.

This is anything but a speculative concern. "[W]hile NCLB promised dramatic funding increases from 2002 through 2007, the funding levels actually requested by the president and appropriated by Congress . . . remained relatively stagnant," even as compliance costs "continue[d] to escalate." *Amicus Curiae* Brief of the Governor of the Commonwealth of Pennsylvania, *supra*, at 9-10. On the Secretary's theory, in such circumstances the NCLB leaves States and school districts a Hobson's choice: they must either divert their own resources to fill the gap in federal funding, or incur the waste, disruption and cost of dismantling programs in midstream.

The alternative posited by petitioners' construction of Section 7907(a)—that, when federal funding is insufficient, States and school districts may continue to participate in the NCLB programs, but with their compliance obligations tempered so that they are not forced to replace federal funding with State or local funding—surely does not "def[y] common sense," Opp. at 18 (quoting *Pennhurst*, 451 U.S. at 24). Petitioners' construction not only gives section 7907(a) its plain meaning, but is more reasonable than a construction under which the financial obligations of State and local governments with respect to NCLB compliance rise and fall without limit depending upon the vagaries of the federal appropriations process. The NCLB did not give States and school districts clear notice that, by choosing to participate in the statutory programs, they were committing themselves to financial obligations that would be determined in such an arbitrary and unpredictable manner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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